

Journal of Gender, Social Policy & the Law

Volume 11 | Issue 1

Article 7

2002

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Duncan, William C. "Sexual Orientation Bias: The Substantive Limits of Legal Ethics Rules." American University Journal of Gender Social Policy and Law 11, no. 1 (2002): 85-100.

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SEXUAL ORIENTATION BIAS: THE SUBSTANTIVE LIMITS OF ETHICS RULES

WILLIAM C. DUNCAN*

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INTRODUCTION

As recent events illustrate, the question of ethics rules and allegations of sexual orientation bias is a live one.¹ These events have highlighted important questions about the role of Canons of Ethics and Professional Responsibility Codes in ensuring fairness in the legal system. Additionally, they have raised important issues about the potential effect of such rules on substantive law. Elsewhere, I have examined the content of State Codes of Judicial Conduct and Rules of Professional Responsibility in an attempt to elucidate a general consensus among elite opinion-shapers in the legal profession.² Based on the intriguing work of Professor Jennifer Gerarda Brown, I have noted that there is a significant argument that such rules might have substantive legal effect beyond merely regulating the legal profession.³

This Article will return to the question of the potential substantive effect of legal professional responsibility provisions to explore the limits of such provisions. First, I will discuss a continuum of understandings of the possible meanings of the provisions. Then, I will examine these different possibilities and their implications. I will conclude by suggesting that the effects of such provisions are, and should be, severely limited.

I. POSSIBLE MEANING OF SEXUAL ORIENTATION BIAS PROVISIONS

The current structure and understanding of legal ethics rules is relatively new.⁴ In 1972, the American Bar Association ("ABA")

1. See Jay Reeves, *Gay Rights Group Accuses Alabama Chief Justice of Bias*, MIAMI HERALD, Feb. 22, 2002, at 17 [hereinafter Reeves, *Gay Rights*] (describing why a gay rights group charged a judge with violating judicial rules in Alabama). Chief Justice Roy Moore labeled homosexuality an "inherent evil" in a written opinion in a child custody case. *Ex parte H.H.*, No. 1002045, 2002 Ala. LEXIS 44, at *1 (Feb. 15, 2002). The Lambda Legal Defense and Education Fund challenged these comments, stating that the comments demonstrated Chief Justice Moore's prejudice and lack of impartiality. Reeves, *Gay Rights*, *supra* note 1.

2. See generally William C. Duncan, "A Lawyer Class": Views on Marriage And "Sexual Orientation" in the Legal Profession, 15 BYU J. PUB. L. 137 (2001) (presenting various viewpoints on sexual orientation and the law on bias from members of the legal community).

3. See Jennifer Gerarda Brown, *Sweeping Reforms from Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny*, 85 MINN. L. REV. 363, 365-71 (2000) (discussing the possible effects of a procedural rule on gay rights litigation); see also Duncan, *supra* note 2, at 155 (discussing the possibility that the implementation of a procedural rule on gay rights litigation may favor homosexual litigants).

4. See Nancy L. Sholes, *Judicial Ethics: A Sensitive Subject*, 26 SUFFOLK U. L. REV. 379, 381-85 (1992) (explaining that the first formal Canon of Judicial Ethics was promulgated in 1924 by a committee of the American Bar Association).

House of Delegates adopted a Code of Judicial Conduct that has been adopted with some alterations in the vast majority of states.⁵ In 1990, the ABA's revisions to the Code included creating a prohibition on sexual orientation bias in Canon 3.⁶ As a result, sexual orientation bias by judges is specifically prohibited in at least thirty jurisdictions.⁷

Nationally, the first formal professional responsibility rules were promulgated in Alabama as the Code of Ethics of the Alabama State Bar in 1887.⁸ In 1908, the ABA promulgated its Canons of Professional Responsibility.⁹ In 1969, the Canons were replaced by a Model Code of Professional Responsibility.¹⁰ This Code was substantially revised in 1983 and has been adopted as the Rules of Professional Conduct in some form by the majority of states.¹¹ As of 2001, sixteen states had included some prohibition of sexual

5. See Ellen S. Podgor, *Criminal Misconduct: Ethical Rule Usage Leads to Regulation of the Legal Profession*, 61 TEMP. L. REV. 1323, 1330-33 (1998) (discussing the adoption of the Code of Judicial Conduct and its function in aiding the judiciary in "establishing and enforcing proper standards of conduct").

6. See Brown, *supra* note 3, at 375-76 (describing the development of the law regarding the Code of Judicial Conduct and noting the lack of controversy surrounding the inclusion of sexual orientation in the anti-bias provisions).

7. See AK R CJC Canon 3 (1998); AZ S CT Rule 81, CJC Canon 3 (1993); AZ S CT Rule 81, CJC Canon 4 (1993); CA ST J ETHICS Canon 3 (1996); CA ST J ETHICS Canon 4 (1997); CO ST CHC Canon 3 (1990); DE R CJC Canon 3 (1995); GA R CJC Canon 3 (1994); HI R S CT EX B CJC Canon 3 (1992); HI R S CT EX B CJC Canon 4 (1992); ID R CJC Canon 2 (1995); KS R RULE 601A Canon 3 (1995); KS R RULE 601A Canon 4 (1995); KY ST S CT Rule 4.300, CJC Canon 3 (1978); ME R CJC Canon 3 (2001); MD R CTS J & ATTYS CJC Canon 3 (1999); MA R S CT RULE 3:09 CJC Canon 3 (1998); MN ST CJC Canon 3 (1993); NE R CJC Canon 3 (1996); NE R CJC Canon 4 (1996); NV ST S CT CJC Canon 3 (2000); NV ST S CT CJC Canon 4 (2000); NJ R CJC Canon 5 (1998); NM R CJC Rule 21-300 (1995); NY R CHIEF ADMIN S 100.3 (1996); ND R CJC Canon 3 (1994); ND R CJC Canon 4 (1994); OH ST CJC Canon 3 (1997); OK ST CJC Canon 3 (1997); RI R S CT ART VI CJC Canon 3 (1997); RI R S CT ART VI CJC Canon 4 (1997); TN R S CT RULE 10 CJC 3 (1997); TN R S CT RULE 10 CJC 4 (1997); TX ST CJC Canon 3 (1999); VT R CJC Canon 3 (2000); WV ST CJC Canon 3 (1993); WI ST CJC SCR 60.04 (1996); WY R CJC Canon 3 (1991); see also *In re* Code of Judicial Conduct, 643 So. 2d 1037 (Fla. 1994).

8. See Podgor, *supra* note 5, at 1326 n.17 (tracing the historical development of formal ethical codes).

9. See *id.* at 1326-28 (discussing the formation of the Canons of Professional Responsibility and emphasizing that the Canons were viewed as a guide, not as mandatory authority).

10. See *id.* at 1326-29 (describing the three levels of review in the Code and the overwhelming acceptance that the Code received from the states). The three levels of review in the Code are, "[t]he Canons . . . are 'axiomatic norms;' the Disciplinary Rules are 'mandatory in character;' and the ethical considerations are aspirational in nature." *Id.*

11. See *id.* at 1326-28 (noting that the Rules stress self-regulation and autonomy in the legal profession, whereas the Code, which was revised due to its numerous deficiencies, was ambiguous on the issues of judgment and enforcement of ethical rules).

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orientation bias in their professional responsibility codes.¹²

Both judicial conduct canons and professional responsibility codes originated as guides that were not legally enforceable. The 1908 ABA Canons of Professional Responsibility were “non-obligatory.”¹³ Similarly, the 1924 Canon of Judicial Ethics was intended to “guide behavior rather than be an enforceable set of rules.”¹⁴ The Canons take on legal significance only if they are adopted statutorily or in court rules.¹⁵ Provisions allowing for disciplinary proceedings were not included until states adopted the Code of Professional Conduct as Rules.¹⁶

A. Possible Interpretations of the Amendments

There is little case law discussing the specific effect of the sexual orientation bias provisions in the Canons and Rules.¹⁷ Three representative reported cases describe situations where a judge has been disqualified from hearing a case because of concerns with bias based on a party’s sexual orientation. In a Florida case, *Rucks v. State*,¹⁸ the judge allegedly referred to a same-sex relationship as a “sick situation” and the defendant sought the judge’s removal.¹⁹ The Florida Court of Appeals held that the defendant’s fear of bias by the judge was well grounded and requested that the judge remove himself so that another judge could be assigned.²⁰ In a Nebraska

12. See Az. R USBCT Rule 1000-1 (1996); Az. R USDCT Rule 1.20 (1994); CA. R USDCTSD CivLR 83.4 (1997); COLO. ST RPC Rule 1.2 (1999); DC R RPC Rule 9.1 (2002); FLA. ST BAR Rule 4-8.4 (1994); MN ST GEN PRAC Rule 2.03 (1998); NJ R RPC 8.4 (1994); NM R RPC Rule 16-300 (1994); NY ST CPR DR 1-102 (2002); OHIO ST CPR DR 1-102 (1995); TX ST CPR DR 5.08 (1998); VT R CJC Canon 2 (1994); WASH. R RPC 8.4 (2000).

13. See Podgor, *supra* note 5, at 1326 (noting that the Preamble of the Canons emphasized that the Canons were to be used as a “general guide”).

14. See Sholes, *supra* note 4, at 381-82 (noting the purpose of the 1924 Canon of Judicial Ethics and its limited enforcement potential).

15. See *id.* at 384-85 (describing the Canons’ introduction of clearer rules and guidelines, but noting they have no legal significance unless they are formally adopted).

16. See *id.* at 1328-30 (explaining the transformation of the Code into disciplinary rules with sanctions).

17. See Duncan, *supra* note 2, at 150-54 (exploring case law addressing the effects of sexual orientation bias provisions).

18. 692 So. 2d 976 (Fla. 1997).

19. See *id.* at 976-77 (recounting the trial judge’s comment about Ms. Rucks’ sexual orientation at her probation hearing that “[t]his is a sick situation” and “[i]f this is the family of 1997, heaven help us.”).

20. See *id.* at 977 (explaining that a judge must be disqualified “if the facts alleged demonstrate merely that the movant has a well-grounded fear that he or she will not receive a fair trial at the hands of the judge.”).

case, *State v. Pattno*,²¹ the judge read a Bible passage that expressed disapproval of homosexual relations in the sentencing of an alleged child molester.²² Because the Nebraska Supreme Court felt the biblical passage was irrelevant and its use troubling, given the need for separation of church and state, the sentence was vacated and the case remanded for consideration by another judge.²³ In Illinois, a judge hesitated in granting a “second parent” joint adoption by two same-sex couples and added, *sua sponte*, the Family Research Council (“FRC”) as a party in the case.²⁴ In *In re C.M.A.*, the Illinois Court of Appeals held that the addition of the FRC was illogical and without legal justification and that the disqualification of the judge was justified by her “predetermined bias against lesbians.”²⁵

The clearest exposition of the general meaning of “bias or prejudice” of judges comes from the United States Supreme Court decision in *Liteky v. United States*,²⁶ which construed the federal judicial disqualification standard.²⁷ In that case, criminal defendants argued that the judge showed bias when he tried to limit political speeches during trial and otherwise evidenced impatience with defendants and their counsel.²⁸ The Supreme Court defined “bias or prejudice” as more than just unfavorable feelings, requiring that bias be wrongful or inappropriate, either because it is undeserved, excessive or based on knowledge that should not be available to the

21. 579 N.W.2d 503 (Neb. 1998), *cert. denied*, 525 U.S. 1068 (1999) (holding that where a judge’s comments could cause a reasonable person to believe there is improper bias, the defendant has been deprived of due process and the judge abused his discretion).

22. *See id.* at 505-06 (referring to the trial judge’s reading of a biblical passage, after which the judge stated that imprisonment of the defendant was necessary as a public protection mechanism and to indicate the severity of the crime).

23. *See id.* at 509.

24. *See In re C.M.A.*, 715 N.E.2d 674, 678 (Ill. App. 1999) (explaining that the Family Research Council (“FRC”) was added as a “second guardian” who was to represent the minor children’s interests). The judge stated that she added the FRC because they stand for the proposition “‘that adoptions by . . . persons living a homosexual lifestyle are not in the best interests of children,’” a position she believed needed to be advocated. *Id.*

25. *Id.* at 679.

26. 510 U.S. 540 (1994).

27. *See id.* at 554 (holding that the “extrajudicial source” doctrine applies to the federal recusal provision for judges, § 455(a), and concluding that the fact a judge possesses an opinion developed from a source outside of the judicial proceedings is not a necessary or sufficient condition to require a judge to recuse himself).

28. *See id.* at 542 (explaining how the defendants argued that the judge was prejudiced against them because of limits placed on the defense counsel, including among other actions, limiting defense counsel’s cross-examination, commenting that opening and closing arguments were not a “political forum,” and interrupting defense counsel during the closing argument).

judge.²⁹ Thus, a judge who forms negative judgements of the parties in the course of judicial proceedings does not show inappropriate bias.³⁰ The Court held that the law provided no general prohibition of prejudice “because the pejorative connotation of the terms ‘bias’ and ‘prejudice’ demands that they be applied only to judicial predispositions that go beyond what is normal and acceptable.”³¹ The Court also clarified that certain things will *not* establish bias: (1) “the judge’s view of the law acquired in scholarly reading,” and (2) judicial rulings.³²

The most important examination of the range of possible meanings of the sexual orientation bias provisions appears in the article by Professor Brown mentioned above. In the article, Professor Brown argues that there are three kinds of bias that would be affected by Canon 3: (1) disrespect toward litigants, (2) biased fact-finding (inappropriate generalizations about litigants and reliance on biased social science), and (3) biased application of substantive laws (applying laws disfavoring homosexuals when not constrained to do so by unequivocal statutory language or precedent).³³

B. A Continuum of Types of Bias

Professor Brown’s argument, the *Liteky* decision and the sparse case law present a continuum of potential meanings of the sexual orientation bias provisions. I would propose the points on the continuum as: (1) a prohibition of name-calling and outright bias, (2) a prohibition of irrelevant notice by the judge of the sexual orientation of litigants or third-parties, (3) an implied requirement of generalized favoring of homosexual parties, and (4) a use of the rules as a “substitute for heightened scrutiny.”³⁴

1. Name-calling

The first kind of bias is obvious and clearly inappropriate. This seems to be what the Florida Supreme Court was concerned about in the *Rucks* case.³⁵ The court noted the judge’s reference to the

29. See *id.* at 550-51.

30. See *id.* at 550-51 (indicating that “[n]ot *all* unfavorable disposition towards an individual . . .” amounts to bias or prejudice).

31. *Id.* at 552.

32. See *id.* at 554-55.

33. See Brown, *supra* note 3, at 370.

34. See *id.* at 367.

35. See *Rucks v. State*, 692 So. 2d 976, 977-78 (Fla. 1997) (addressing the trial judge’s comments regarding Ms. Rucks and her sexuality); see also *supra* text accompanying notes 19-20.

same-sex relationship as a “sick situation” and his observation that “[i]f this is the family of 1997, heaven help us.”³⁶ Arguably, these comments might have been enough for the court to find that the judge had exhibited bias. It is important to note, though, that the court did not specifically mention Canon 3’s provision.³⁷ The decision may reflect a concern not with the judge’s bias against the defendant’s sexual orientation, but merely with bias against this particular defendant, irrespective of any class to which she might belong. It is also important to note that the type of bias in this first category is easy to identify because it involves some kind of obvious action on the part of the judge, generally an inappropriate comment. This type of bias would be prohibited regardless of whether sexual orientation is actually mentioned in the bias provision.

2. *Irrelevant notice of sexual orientation*

The second type of bias may have been the concern of the *Pattno* case.³⁸ However, since the court did not specifically find that the judge engaged in sexual orientation bias, it is not clear that the court was concerned with this bias.³⁹ The court did note that while the passage read by the judge was about homosexuality, the crime alleged was child molestation; accordingly, the court held that the passage was irrelevant to the crime at issue.⁴⁰ This may indicate that the court’s concern was with the judge’s raising a sexual orientation matter that was not relevant to the case. One could also argue that this was the problem in *Rucks*, because the underlying case was about a domestic dispute that did not raise any questions of homosexuality.⁴¹ This kind of bias is also relatively easy to identify, such as when a judge hearing a criminal case refers to the sexual orientation of the defendant when the underlying crime has nothing to do with sexuality. As with name-calling, this type of bias could be found even where a state’s bias provisions do not specifically enumerate sexual orientation as a discrete classification. Some of

36. *Rucks*, 692 So. 2d at 977.

37. *See id.* (failing to discuss Canon 3’s prohibition on sexual orientation bias in determining whether the trial judge was prejudiced against Ms. Rucks).

38. *See State v. Pattno*, 579 N.W.2d 503 (Neb. 1998).

39. *See id.* at 505-06, 509 (addressing whether statements of religious expression by a judge can be evidence of bias or prejudice).

40. *See id.* at 508 (examining the test and standard employed in a bias determination). The Court determined that bias is established when a “reasonable person” would conclude that the judge was biased toward one party. *See id.* (discussing the adoption of the “reasonable person” test).

41. *See Rucks*, 692 So. 2d at 976 (stating that the case resulted from a dispute between Ms. Rucks and the daughter or her live-in female companion).

what Professor Brown identifies as biased fact-finding may actually fit in this category, such as when a judge assumes negative factors weighing against a litigant merely because that litigant appears to have a certain sexual orientation.⁴²

3. *Preference for homosexual litigants*

The third category, an implicit requirement of generalized favor toward homosexual parties, has not been specifically advanced in any particular interpretation of the rules but may be implicit in the expansive reading of the anti-bias provisions. For instance, Professor Brown's solution to the problem of biased judicial notice is "to prohibit judges from taking judicial notice of facts about homosexuality to the detriment of gay or lesbian litigants."⁴³ Taken literally, this solution could be read to compel a judge to be more exacting in a requirement of proof with some classes of litigants than with others. While no one has argued that a court cannot assume that a cohabiting opposite-sex couple are engaged in an intimate relationship, Professor Brown seems to argue that to do so with a similarly situated same-sex couple would be disallowed.⁴⁴ More to the point, a judge charged with determining the best interests of the child in a custody dispute may appropriately consider relationships in which the parent seeking custody is involved and weigh them as either beneficial or detrimental to the child. In the formulation suggested by Professor Brown, that would not be possible if the relationship was a same-sex relationship and was not egregiously promiscuous.⁴⁵

This requirement of favor may have been at work in *In re C.M.A.*, as the court arguably could have relied on the fact that the judge seemed clearly uncomfortable with the idea of adoption by same-sex couples.⁴⁶ Another example of the favor requirement is a Massachusetts case in which a judge ordered a home study in an

42. See Brown, *supra* note 3, at 388-416 (discussing explicit bias by judges made evident through distortions of findings of fact).

43. *Id.* at 405.

44. See *id.* at 390-91 (arguing that many judges construe homosexuality only in terms of sexual conduct and that, as a result, they view a person identifying as gay or lesbian as violating criminal sodomy statutes).

45. See *id.* at 425-26 (indicating that a judge could consider the promiscuity of a parent as a factor affecting the well being of a child).

46. See *In re C.M.A.*, 715 N.E.2d 674, 679 (Ill. App. 1999) (arguing that the problem at issue was the irrelevance of the parties' sexual orientation as described in the second category since Illinois law seemed to treat sexual orientation as irrelevant in adoption cases). However, the facts of this case are so unique that it may not reveal anything about the state of the law regarding judicial bias. *Id.*

adoption petition by a same-sex couple.⁴⁷ Although the standard for reversing a trial court's decision not to waive a home study is that the judge abused her discretion, the Massachusetts Supreme Judicial Court remanded for a detailed explanation of the failure to waive the home study without finding abuse of discretion based merely on an unsupported claim that bias motivated the denial.⁴⁸

Unlike the first two categories, this implied requirement of favor is obviously a much more controversial proposition. It moves from what is traditionally thought of as bias or prejudice (prohibited favor or disfavor for a party or class of persons) into a requirement that a court actually favor a certain class of litigants which would involve a judge taking a substantive legal position.

4. *Bias provision as constitutional standard*

The final category moves even further from the traditional understanding of the reach of bias provisions. It posits that Canon 3 of the Code of Judicial Conduct can act as a "substitute" for either a constitutional amendment or Supreme Court holding that classifications on the basis of sexual orientation should be subjected to heightened scrutiny.⁴⁹ Thus, the anti-bias provision becomes a "supplement" to constitutional law, and arguably an actual constitutional mandate.⁵⁰ This reading would require judges to refuse to follow precedent deemed to be "anti-gay" if it predates the adoption of the Code of Judicial Conduct.⁵¹ Professor Brown notes that construal of the provisions in this manner would actually make them a kind of constitutional law *plus*, since they would not only affect substantive law, but also result in the discipline of a judge who rules in favor of an "anti-gay" law without being compelled to do so.⁵²

47. See, e.g., *In re Galen*, 680 N.E.2d 70, 72 (Mass. 1997) (noting that the Probate Court ordered a home study to be conducted, despite having authority under state law to grant a waiver of the home study when one of the parties petitioning for the adoption is a parent).

48. See *id.* at 73 (explaining that the case was remanded for further inquiry because the probate court did not explain with specificity the reasons for denying the motion to waive the home study).

49. See generally Brown, *supra* note 3, at 424-27.

50. See *id.* at 436-37 (explaining that Canon 3 is a non-constitutional means of forcing judges to avoid basing decisions on a general condemnation of or distaste for homosexuality).

51. See *id.* at 431-32 (noting that both appellate level and Supreme Court cases that pre-date the Code of Judicial Conduct would lose credibility, allowing judges to rule inconsistently with previous opinions).

52. See *id.* at 438-40 (arguing that Canon 3 creates an additional layer of incentives and subjects judges who allow an anti-homosexual bias to enter the proceedings to disciplinary sanctions).

This understanding of the reach of anti-bias provisions is far removed from any kind of traditional understanding of judicial fairness.

II. LIMITATIONS OF BIAS PROVISIONS

The standard employed in *Liteky* appears to set a very high threshold for finding bias sufficient to require removal of a judge from a case.⁵³ Arguably, this standard would only be invoked in the case of conduct in the first two categories of the continuum set out above. Even if the exacting standard of *Liteky* was not the rule in a given state, it seems clear that establishing bias by a judge is difficult under most formulations.⁵⁴ Any existing standard would specifically disclaim any substantive legal effect for provisions beyond a determination of whether a judge showed bias in a specific instance. It would certainly not suggest that anti-bias provisions would affect other laws.

The wisdom of a stringent test for bias is manifest in the important policies advanced by a narrow understanding of the scope of the bias provisions. Conversely, the expansive constructions of the bias provisions outlined above should be resisted to the degree they conflict with these crucial policy considerations.

A. Fairness

The most obvious value promoted by ethics rules is ensuring fairness to litigants and other participants in the court system. To promote fairness, it is crucial to ensure that flagrant and unreasonable bias is not allowed to damage the judicial process. However, some of the proposed readings of current anti-bias provisions would actually undermine the fairness of the system. If judges are required to look with favor on certain classes of litigants, a system of reverse discrimination is created. For instance, if a party to a custody dispute sincerely believes that the same-sex intimate relationship of his or her ex-spouse is causing harm to their children and can offer good faith evidence that this is the case, it would be unfair not to allow a judge to hear this evidence merely because the other party is identified as a member of a discrete class in the Code of Judicial Conduct or Rules of Professional Responsibility.

53. See *Liteky v. United States*, 510 U.S. 540, 550-51 (1994) (requiring bias or prejudice be wrongful or inappropriate); see also *supra* notes 26-32 and accompanying text.

54. See *id.* at 557-58 (1994) (Kennedy, J., concurring) (explaining that the reviewing court must have reasonable grounds to question the neutral and objective character of a judge's ruling or findings).

B. Separation of Powers

Central to the constitutional system of the United States is the concept that the separate branches of government are to operate within the spheres constitutionally allotted to them without infringing on the roles of the other branches. A regime in which certain outcomes in court cases are mandated by ethics rules would threaten this principle. Professor Brown gives the example of a court determination that a certain contract would be void as against public policy to illustrate a violation of the Code of Judicial Conduct unless the law specifically requires that result and was enacted since the adoption of Canon 3 in that jurisdiction.⁵⁵ This would require a court to ignore contrary policy pronouncements by the legislature and make their own law on certain subjects. It would prevent judicial restraint, and in fact even *mandate* judges *not* to act with deference to legislative policies for fear they might be subject to discipline for doing so. At the very least, it would allow judges to ignore legislative direction they deem to be not “clear” enough. In addition, such a rule would threaten the independence of the judiciary by requiring the judge to take into account the view of the disciplinary commission in making his decisions rather than looking to the substantive law on the matter at hand.⁵⁶

C. Constitutional Amendment Process

The idea that an anti-bias rule could be a “substitute” for heightened scrutiny allows for an amendment to a state or federal constitution without following the established procedures for such an amendment. Rather than representing a straightforward attempt to make new constitutional policy by changing the nature of the document, a constitutional principle of nondiscrimination on the basis of sexual orientation would be added at the behest of an extremely small set of lawyers who are responsible for promulgating the ethics rules in a particular jurisdiction.

For instance, another example of biased judging used by Professor Brown is a situation in which a judge relies on the fact that a litigant is not married to deny rights available to married persons.⁵⁷ This is

55. See Brown, *supra* note 3, at 427-28 (describing a decision by the Supreme Court of Georgia that voided a pre-nuptial-type contract between two lesbians because the relationship was “illegal and immoral”).

56. See Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 962-63 (1996) (arguing that judges would be too concerned with what was proper in terms of the disciplinary commission’s powers).

57. See Brown, *supra* note 3, at 426 n.269 (arguing that a judge could use a factor such as marriage to disadvantage homosexuals in child custody disputes, because

labeled as bias because the decision would have a “disparate impact” on homosexual persons since they cannot marry another person of the same-sex. Employing the disparate impact analysis for determining discrimination runs counter to the precedent governing federal constitutional law.⁵⁸ Only one state appellate court has ever applied the disparate impact analysis in the context of a sexual orientation discrimination claim as a matter of constitutional interpretation.⁵⁹ Such a radical departure from this clear precedent should only be made through the appropriate amendment process rather than the promulgation of a rule of ethics.

D. Popular Sovereignty

Closely related to the concern with the constitutional amendment process is another crucial principle of government—the need for the governed to consent to laws made in their name. Thus, lawmaking power is reserved to the legislature because legislators are directly accountable to the people who elect them. Again, lawmaking by judges pursuant to an ethics mandate would threaten this concept. It would give cover to activist judges seeking certain results in cases when the law is contrary to their position. To paraphrase another ethical concern for attorneys, it would encourage the “unauthorized practice of lawmaking.”

Recent controversies indicate that this is not an idle concern. For instance, when the Massachusetts attorney general’s office recently argued in favor of that state’s marriage law and against an attempt to have the law redefined to include same-sex couples, local activists accused the state attorney of homophobia.⁶⁰ One said, “I don’t think that Jerry Falwell could have made arguments that were any more mean-spirited.”⁶¹ In addition, activists criticized the attorney general

they do not have the opportunity to marry their partners).

58. See *Nguyen v. INS*, 533 U.S. 53, 82-83 (2001) (O’Connor, J., dissenting) (stating that the Supreme Court does not apply heightened scrutiny to facially neutral laws, despite the fact that they may have a disparate impact); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (indicating that a facially neutral law is not unconstitutional solely because it has a disparate impact on a certain race).

59. See *Tanner v. Or. Health Sci. Univ.*, 971 P.2d 435, 443 (Or. App. 1998) (applying disparate impact analysis in a matter concerning the granting of health insurance and other benefits to the partners of homosexual employees).

60. See Laura Kiritsy, *Activists Blast Reilly’s Marriage Positions*, BAY WINDOWS, Mar. 7, 2002 (discussing gay and lesbian rights activists’ responses to the Massachusetts’ attorney general’s arguments against changing that state’s marriage law to include same-sex couples), available at <http://baywindows.com/main.cfm?include=detail&shryid=2206538>.

61. *Id.* (quoting Gary Duffin, co-chair of the Massachusetts Gay and Lesbian Political Caucus).

for certifying a proposed constitutional amendment defining marriage, even though that amendment received far more than the number of signatures needed to put it before the legislature.⁶² What is not mentioned in the news account of this criticism is the fact that defending state law and certifying proposed constitutional amendments are legal requirements of the attorney general's job. Activists would thus like to tar the attorney general as unethical for doing what the law requires. If they succeed, they will have created a new rule of law without the difficult process of enacting legislation favorable to their point of view.

Similarly, numerous groups have attacked Chief Justice Roy Moore of the Alabama Supreme Court for arguing that Alabama law strongly disfavors homosexual behavior.⁶³ Interestingly, none of these groups have actually taken issue with Chief Justice Moore's description of the state of Alabama law. Alabama law, which prohibits consensual sodomy between persons of the same sex, same-sex marriage, and even allows custody decisions to be made on the basis of a concern with a parent's homosexuality, seems to disfavor homosexual relations.⁶⁴ Thus, it would take a stretch to argue that a judge who points out the possibility that Alabama law disfavors homosexual behavior should be removed from office. Indeed, Chief Justice Moore's opinion merely concurs with the unanimous decision denying custody to a woman in a same-sex partnership.⁶⁵ News reports indicate that this may be the basis of the Judicial Inquiry Commission's decision not to pursue the bias complaint against Chief Justice Moore.⁶⁶

62. See *id.* (citing gay-rights activists who are critical of Massachusetts Attorney General Thomas Reilly's allowance of a petition for an "anti-gay" constitutional amendment entitled "Protection of Marriage").

63. See Reeves, *Gay Rights*, *supra* note 1 (noting that one organization that has been critical of Chief Justice Moore, the Lambda Legal Defense and Education Fund, filed an ethics complaint against him with the Judicial Inquiry Commission); see also Jim Maynard, *Specter of Taliban Raised in Alabama Judge's Attack on Gays*, COMMERCIAL APPEAL (Memphis), Mar. 1, 2002, at B5 (comparing Chief Justice Moore's characterizations of homosexuals to those used by the Taliban regime in Afghanistan).

64. See, e.g., *Ex parte H.H.*, No. 1002045, 2002 WL 227956, *6-7 (Ala. Feb. 15, 2002) (Moore, C.J., specially concurring) (discussing the criminalization of homosexual acts in Alabama and recognizing that a parent's homosexuality is a significant consideration in resolving custody disputes in that state).

65. See *id.* at *4 (concurring with the opinion of the majority in its finding that the mother did not show a change of circumstance significant enough to warrant a transfer of custody).

66. See Jay Reeves, *Panel Rejects Lambda Bias Complaint*, ASSOC. PRESS ONLINE, Mar. 21, 2002 (discussing a letter to the Lambda Legal Defense and Education Fund which notes that the Commission does not act against judges for languages in judicial opinions), available at <http://www.dadi.org/rjtchomo.htm>; see also Dahleen Glanton,

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Of course, it may be that proponents of an expanded role for anti-bias provisions would like to decrease public input in the lawmaking process in some instances. For instance, it seems that Professor Brown acknowledges the fact that the expanded understanding of Canon 3 would work against public input in lawmaking.⁶⁷

E. Factions and the Underlying Structure of Government

Elsewhere I have raised the possibility that arguments such as those made in favor of expanding the substantive reach of anti-bias provisions could threaten the underlying structure of government. This would give a faction in the legal profession almost unchecked power over substantive lawmaking in contravention of one purpose of the U.S. Constitutional system described in Federalist 10, the balancing of different factional interests.⁶⁸

F. Proposed Limitations

While the preceding considerations do not necessarily provide an exhaustive framework for determining when unfair bias or prejudice is at work, they do suggest certain important limitations on the scope of bias provisions.

1. Bias provisions cannot constitute de facto constitutional amendments creating new suspect classes or requiring heightened scrutiny for new classifications.
2. The provisions cannot be used as a way to avoid the heavy lifting required to enact legislation favorable to a certain class of litigants.
3. The provisions also cannot serve to create categorical rules of decision where fact specific balancing is currently required (i.e. "the best interest of the child").

Not only do these limitations help protect important policy considerations regarding the roles of the respective branches of government and the need for laws to be made only with the consent

Judge Unveils Biblical Sculpture, SEATTLE TIMES, Aug. 18, 2001, at A8 (indicating that another possible contributing factor to Chief Justice Moore's decision was his obligation to the electorate, as he defeated his opponent in the election, fifty-five percent to forty-five percent, by running a grass-roots campaign).

67. See Brown, *supra* note 3, at 446 n.352 (recognizing that states that have not adopted Canon 3 are more likely to require judges to run for re-election as opposed to relying on gubernatorial appointments).

68. See Duncan, *supra* note 2, at 182 (arguing that factional interests may lead to "a corruption of one political process that could threaten marriage and democracy"); see also THE FEDERALIST NO. 10 (James Madison).

of the governed, they are also consistent with the purpose of the provisions as promulgated. The “Scope” section of the ABA’s Model Rules of Professional Conduct indicate that the Rules should be “interpreted with reference to . . . the law itself.”⁶⁹ One commentator has noted that the Code of Judicial Conduct and Rules of Professional Responsibility are not meant to be treated as substantive law beyond disciplinary settings.⁷⁰

It seems very unlikely that those states that have adopted the Code of Judicial Conduct intended it to achieve a major overhaul in the state’s legal philosophy and constitutional law. Alaska, Hawaii and Nebraska all have constitutional amendments defining marriage as the union of a man and a woman.⁷¹ The vast majority of the other states that have adopted the new version of Canon 3 have statutes that provide that marriages between same-sex couples will not be recognized.⁷² Only eight states have statutory provisions barring discrimination on the basis of sexual orientation.⁷³ The states reflect

69. A.B.A. CTR. FOR PROF’L RESP., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT xvi (4th ed. 1999).

70. See generally Podgor, *supra* note 5, at 1346-48 (discussing the negative repercussions of using ethical rules in criminal trials of attorneys or judges).

71. See ALASKA CONST. art. I, § 25 (stating that a valid marriage in Alaska exists only between one man and one woman); HAW. CONST. art. I, § 23 (maintaining that the state legislature can reserve marriage to opposite sex couples); NEB. CONST. art. I, § 29 (establishing that marriages between persons of the same sex will not be recognized).

72. See ALA. CODE § 30-1-19 (1998 & Supp. 2001) (prohibiting marriage between persons of the same sex); ARIZ. REV. STAT. ANN. § 25-101 (West 2000) (stating that marriage between persons of the same sex is void and prohibited); 2000 Cal. Legis. Serv. Prop. 22 (2000) (establishing that the only valid marriage in the state is one between a man and a woman); COLO. REV. STAT. § 14-2-104 (2001) (amending Colorado law to limit marriage to a union between one man and one woman); DEL. CODE ANN. tit. 13, § 101 (1999) (establishing that marriages between people of the same sex are void and prohibited); FLA. STAT. ANN. § 741.212 (West 2000) (stating that marriages between persons of the same sex are not recognized by the state); GA. CODE ANN. § 19-3-3.1 (1999 & Supp. 2002) (failing to recognize marriages between persons of the same sex); HAW. REV. STAT. § 572-3 (1999) (establishing that only marriages between one man and one woman are legal in the state); IDAHO CODE § 32-209 (Michie 1996) (stating that same-sex marriages violate public policy); KAN. STAT. ANN. § 23-101 (1995) (defining marriage as a civil contract between persons of opposite sexes); MINN. STAT. ANN. § 517.01 (West 2002) (establishing that marriage is only lawful when existing between persons of opposite sexes); N.D. CENT. CODE § 14-03-01 (1997) (limiting marriage to a union between one man and woman); OKLA. STAT. tit. 43, § 3.1 (2001) (prohibiting marriage between persons of the same gender); TENN. CODE ANN. § 36-3-113 (2001) (stating that a marriage between one man and one woman is the only legal marriage in the state); UTAH CODE ANN. § 30-1-2 (1998) (stating that a marriage between persons of the same sex is prohibited).

73. See CAL. GOV’T CODE § 12940 (2002) (making it unlawful for an employer to discriminate on the basis of sexual orientation); MASS. GEN. LAWS ch. 151B, § 4 (2002) (establishing that it is illegal for an employer to discriminate on the basis of sexual orientation); MINN. STAT. ANN. § 363.03 (2002) (stating that discriminating on the basis of sexual orientation is an unfair employment practice); NEV. REV. STAT.

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a variety of positions on sexual orientation discrimination and sometimes an individual state has a number of seemingly conflicting statutory policies. Surely a judicial ethics code cannot radically modify this situation.

Finally, the inclusion of other classes in the anti-bias provisions of Canon 3, such as “marital status,” pregnancy, and “social or economic status,” which are not afforded constitutional heightened scrutiny, indicate that the Canon was not intended to have such a serious substantive effect.⁷⁴

CONCLUSION

Even without the inclusion of sexual orientation as a discrete class protected from judicial bias, it is probable that name-calling by judges and attorneys is out of the realm of appropriate ethical behavior. Likewise, prejudicing the fact-finder in a court setting by irrelevant reference to personal characteristics or behavior of litigants is “out-of-bounds” regardless of the characteristic referenced. Beyond this, though, can anti-bias provisions be said to have a substantive effect on the law? For the reasons described here, the answer should clearly be no. To find otherwise would be to introduce another kind of bias into the legal system. It would mar the constitutional structure of the nation and invite abuse of the political process by judges. Perhaps most perilously, it would undermine the core value of popular sovereignty and in so doing, provide a serious blow to the independence of the judiciary and the integrity of the legal profession.

ANN. § 613.330 (Michie 2001) (prohibiting discrimination or segregation on the basis of sexual orientation); N.J. STAT. ANN. § 10:5-12 (West 1993 & Supp. 2002) (establishing that discriminating on the basis of sexual orientation is an unfair employment practice); R.I. GEN. LAWS § 28-5-7 (2000) (stating that refusing to hire someone on the basis of sexual orientation is an unlawful employment practice); VT. STAT. ANN. tit. 21, § 495 (2001) (stating that discrimination on the basis of sexual orientation is an unlawful employment practice); WIS. STAT. ANN. § 111.322 (West 1997 & Supp. 2001) (prohibiting employment discrimination on the basis of sexual orientation).

74. See AK. CJC, Canon 3 (2002) (discussing that a judge should act impartially while performing the duties of judicial office), *available at* <http://www.state.ak.us/courts/cjc/htm>.